109-398

398-446

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 926.

THE MEMPHIS GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript filed in Supreme Court	1	1
Warrant of arrest	2	1
Judgment	5	2
Appeal bond	5	2
Judgment	8	2
Bill of exceptions tendered and appeal to Supreme Court	10	3
Bill of exceptions	10	3
Appeal bond	13	4
Judgment of Supreme Court	15	4
Opinion of Supreme Court	17	5
Petition for writ of error and supersedeas	21	5
Bond	24	6
Writ of error and supersedeas	28	7
Certificate of Chief Justice	31	8
Citation	33	8
Proof of service	35	9
Clerk's certificate	36	9

a Transcript of record from supreme court of Tennessee, at Jackson, in the case of The Memphis Gas Light Company, plaintiff in error, vs. The Taxing District of Shelby County, Tennessee, defendant in error.

1 THE STATE OF TENNESSEE.

Pleas before the supreme court of said State for the western division thereof, at Jackson, on the first Monday of April, A. D. 1883.

Present, the Hon. Jas. W. Deaderick, chief-justice, and J. B. Cooke, Wm. F. Cooper, Thos. J. Freeman, and Peter Turney, judges, to wit:

Be it remembered that heretofore, to wit, on the 8th day of May, 1883, a transcript of the record in the case of The Memphis Gas Light Company, plaintiff in error, against The President of Fire and Police Commissioner of the Taxing District of Shelby County was filed in the office of the clerk of the supreme court of the State of Tennessee for the western division, at Jackson, in the words and figures following, to wit:

2 STATE OF TENNESSEE:

At a circuit court begun and held in and for the county of Shelby, at the court-house, in the taxing district, on the third Monday in January, 1883; the Hon. James O. Pierce, judge of said court, present and presiding; also present, Joseph Uhl, clerk of said court, and P. R. Athy, sheriff of Shelby County, when the following proceedings were had and ordered to be entered upon the minutes of said court, to wit:

Warrant of arrest.

STATE OF TENNESSEE,
Taxing District of Shelby County:

Before me this day personally appeared P. S. Simons and made
3 oath that Memphis Gas Light Co., Jos. Craig, sect'y, the president of the company being absent from Shelby County, did, on the day of March, 1883, in said district, and within the jurisdiction of the police court of the Taxing District aforesaid, commit the offence of doing business without license, contrary to law and the ordinances of said district.

P. S. SIMONS.

Sworn to and subscribed before me this 26th day of April, 1883.

D. P. HADDEN,
Prest. of Fire and Police Com'r.

STATE OF TENNESSEE,
Taxing District, Shelby County:

To any officer of the police:

Information on oath having been made to me that the offence of doing business without license has been committed within the Taxing Dis-
4 trict, in violation of the ordinances of said district, and accusing Memphis Gas Light Company, Jos. Craig, secretary thereof, you

are therefore commanded, in the name of the president of fire and police commissioners of the taxing district, to arrest Jos. Craig, sec't'y of said gas-light company, and bring him before the president of fire and police commissioners, in the taxing district and county of Shelby, to answer the charge.

This 26' day of April, 1883.

D. P. HADDEN,
Prest. Fire and Police Com'rs.

(Endorsed:) Issued Ap'l 26, 1883. Executed Ap'l 26, 1883, by arresting the within-named person.

SMITH, *Officer.*

5 *Judgment.*

THE PRES'T OF F. AND P. COM'RS OF THE TAXING DISTRICT
vs.
MEMPHIS GAS LIGHT CO.

It is considered by me in this case that the defendant is guilty as charged in the warrant, and that it pay a fine of fifty dollars, and in default of payment of said fine that he be committed to the work-house, the district prison, until said fine and costs be paid.

April 26th, 1883.

D. P. HADDEN,
Pres't of Fire and Police Com'rs.

Appeal bond.

6 Know all men by these presents that we, Jos. Craig, sec't'y Memphis Gas Light Company, and Napoleon Hill and Joseph Bruce, are held and firmly bound unto the Taxing District of Shelby County, Tennessee, in the sum of two hundred and fifty dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, and assigns. Witness our hands and seals this 27th day of April, 1883.

The condition of the above obligation is such that whereas the said Memphis Gas Light Co. was arraigned before D. P. Hadden, the pres't of fire and police commissioners of said district, on the 27th day of April, 1883, upon a charge of doing business without license, in viola-
7 tion of the ordinances of the said district, and was found guilty as charged, and fined fifty dollars and costs, from which judgment of said president he prayed and obtained an appeal to the next term of the circuit court of Shelby county, to be held at the court-house thereof on the 3rd Monday in May, 1883.

Now if the said Memphis Gas Light Co. shall prosecute its said appeal successfully, or, in case of failure, shall abide by and perform the judgment of said circuit court of Shelby County in the premises, then this obligation to be void; otherwise to remain in full force and effect.

JOS. CRAIG, *Sec't'y M. G. L. Co.* [SEAL.]
NAPOLEON HILL. [SEAL.]
JOSEPH BRUCE. [SEAL.]

Approved:

D. P. HADDEN, *Pres't F. & B. Com'rs.*

8 (Endorsed:) Filed April 28th, 1883. Jos. Uhl, clerk.

And, to wit, on Wednesday, May 2nd, 1883.—January term, 1883.

Judgment, &c.

THE PRES. OF FIRE AND POLICE COMMISSIONERS of the Taxing District of Shelby County, Tenn, *vs.* MEMPHIS GAS LIGHT CO. } 7629. T. D.

Come the parties by their attorneys, and by agreement and consent this case is tried this day before the court without a jury, and having heard the evidence the court finds in favor of the plaintiff, and assess the fine
9 against the defendant at fifty dollars. It is therefore considered by the court that the plaintiff recover of the defendant the sum of fifty dollars, together with the State and county tax on this litigation, and of the defendant, and Napoleon Hill and Joseph Bruce, sureties on appeal bond, the costs herein.

As a part of this judgment, it is ordered that on failure of defendant to pay the fine and costs herein they be rearrested and turned over to the police authorities of the taxing district to be dealt with as other offenders found guilty before the president of fire and police commissioners, and execution will issue accordingly.

To the judgment of the court herein defendant excepted and
10 now tenders his bill of exceptions, which is signed by the judge presiding, and ordered to be filed as part of the record herein. Thereupon defendant prays an appeal, in *in* the nature of a writ of error, from the judgment herein to the present term of the supreme court now in session at Jackson, Tennessee, and having executed an appeal bond in the penalty of $250.00 with J. M. Peters as surety, and plaintiff's counsel consenting that the appeal may be taken to the present term of the supreme court, the appeal is granted as prayed.

Bill of exceptions.—Filed May 2nd, 1883.

MEMPHIS GAS LIGHT CO., PLAINTIFF IN ERROR, *vs.* PRES. OF THE FIRE AND POLICE COMMISSIONERS, Taxing District Shelby Co., Tenn.

11 Appeal in error from circuit court of Shelby County, Tenn.

In this cause it was agreed that this case might be heard by the circuit court at its January term, 1883, which was accordingly done.

The evidence showed that the Memphis Gas Light Company having had a privilege tax of $250.00 per annum imposed upon it by act of the last general assembly, acts of 1883, chapter , page , section 11, subsection 74, which privilege tax defendant declined to pay, and was arrested for such failure to pay under the warrant contained in the
12 record, and was fined $50.00 for failure to pay said privilege tax, by the president of the fire and police commissioners of said Taxing District, from which judgment said Memphis Gas Company took an appeal to the May term, 1883, of the circuit court of Shelby Co., Tenn., and by

agreement said cause was heard by said circuit court on its merits on the 2nd of May, 1883.

This was all the evidence.

The court held that the gas company was liable for said privilege tax, and therefore affirmed the judgment; to which ruling the said gas company excepted, and thereupon made its motion for a new trial, which was refused, and now tenders this its bill of exceptions, which it prays may be
13 signed and made a part of the record in this case, which is accordingly done, this 2nd day of May, 1883.

JAMES O. PIERCE, *J.*

Appeal bond.—Filed May 2nd, 1883.

Know all men by these presents that we, the Memphis Gas Light Company, principal, and J. M. Peters, surety, are held and firmly bound unto the Taxing District, its successors and assigns, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made and done, we bind ourselves and each of us, our heirs, executors, administrators, and assigns, both jointly and severally, firmly by
14 these presents. Sealed with our seals, and dated this 2' day of May, A. D. 1883.

But the condition of the above obligation is such that whereas the above bounden gas-light company this day prayed and obtained an appeal, in the nature of a writ of error, to the present term of the supreme court, now in session for the western division of the State of Tennessee, at Jackson, from a judgment which the said Taxing District obtained against said company in the circuit court of Shelby County, at the January term, and on the 2nd day of May, 1883, for fifty dollars and costs of suit.

Now, if the said appellant prosecute its said appeal with effect,
15 or in case it fail therein do pay and satisfy, abide by and perform the judgment, order, or decree of the said supreme court to be had therein, and all such costs as may be awarded against it for wrongfully prosecuting said appeal, or in any event shall pay all costs which may at any time be adjudged against it in the cause in said supreme court, then this obligation to be void; otherwise to remain in full force and effect.

MEMPHIS GAS LIGHT CO. [SEAL.]
By JOSEPH CRAIG, *Sec'y.*
JNO. M. PETERS. [SEAL.]

In the supreme court.

WEDNESDAY, *June 13th*, 1883.

16 THE MEMPHIS GAS LIGHT COMPANY } = 939. Shelby law
v. docket.
THE TAXING DISTRICT OF SHELBY COUNTY. }

The parties appear by their attorneys, and thereupon the record, proceedings, and judgment of the court below in this cause being seen and fully understood by this court, and it appearing that in the same there is no error, it is therefore considered that the judgment aforesaid be in all things affirmed, and this cause remanded to the circuit court of Shelby County

for the execution of its said judgment; and that the plaintiff in
17 error and U. Hill and Joseph Bruce, its sureties, on appeal bond to the court below, and John M. Peters, surety on appeal bond to this court, pay the costs of this appeal, for which let execution issue.

Opinion.

THE MEMPHIS GAS LIGHT CO.
vs.
THE TAXING DISTRICT.

The legislature at its last session imposed a tax on gas companies, and imposed a tax on the same for the benefit of Taxing District, and made it a misdemeanor to exercise the privilege without obtaining a license or paying the tax.

The circuit judge imposed a fine of $50.00 on the company, and it has appealed to this court.

18 The argument in its behalf here is that having been chartered in 1851 the act granting privilege of constructing works, &c., and containing a restriction that gas should not be sold above a certain price, no other burden can be now imposed upon it. The constitution now, as then, confers the power on the legislature to tax privileges in such manner as they may from time to time direct.

No exemption from taxation is contained in the charter of the company, and we see no reason why it should not be liable. Imposing a tax upon it does not divest it of any of its charter rights. It only imposes
19 what the legislature deems a fair proportion of a public burden indispensable to the support of the government.

The judgment below will be affirmed and the cause remanded for the execution of the judgment.

Deaderick, C. J.

20, 21 *Petition for writ of error and supersedeas.*

To the judges of the supreme court of the State of Tennessee and to the chief-justice thereof:

The Memphis Gas Light Company respectfully represents that on the 13th day of June, 1883, the final judgment of this honorable court, sitting at Jackson, Tennessee, has been entered in the case of The Memphis Gas Light Company vs. The Taxing District of Shelby County, Tennessee, which judgment is adverse to petitioner, the said Memphis Gas Light Company, petitioner, submits herewith to this court and to the chief-justice thereof a copy of the record of said cause, and respectfully asks that the chief-justice of this court do allow to it a writ of error to remove the said case
22 to the Supreme Court of the United States, for review by that court, and a supersedeas to stay action upon said judgement pending said writ of error.

The question involved in said cause is the validity of an act of the Legislature of the State of Tennessee, approved February 27th, 1883, declaring the making and selling of gas a privilege, and requiring gas companies to take out license before doing that business, and also requiring the payment of a tax or price of $250 in order to obtain said license. Under an-

other law, passed at same session, the State and the county of Shelby, by proceedings not now before this court, and the said Taxing District, under both laws in the cause in which this petition is filed, seek to compel petitioner to discontinue its business or take out said license. Petitioner claims that by the charter of its incorporation it has obtained from the State of Tennessee the right and privilege to make and sell illuminating gas, and that this is a contract protected by the contract-clause of the Constitution of the United States, and that the legislation aforesaid of the State of Tennessee violates the obligation of that contract. This is the question presented and decided in said case, and the decision sustains the validity of said legislation, and the judgment entered as aforesaid in said case thus presents a Federal question cognizable by the Supreme Court of the United States.

The prayer of petitioner is that the Hon. James W. Deaderick, who is chief-justice of the supreme court of the State of Tennessee, in which court the said judgement has been entered, on this 14th day of June, 1883, will allow to petitioner a writ of error with supersedeas in said cause to remove it to the Supreme Court of the United States, with proper citations, &c.

THE MEMPHIS GAS LIGHT COMPANY,
By CROFT & COOPER, *Att'ys.*

(Endorsed:) Filed June 14th, 1883. D. P. Davis, deputy clerk.

Bond.

Know all men by these presents that the Memphis Gas Light Company, a corporation chartered by law of the State of Tennessee, as principal, and Napoleon Hill & Henry Croft, as its sureties, are held and firmly bound unto the Taxing District of Shelby County, Tennessee, in the penal sum of five hundred dollars, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, &c., jointly and severally, firmly by these presents. Witness our hands and seal' this 14th day of June, 1883.

The condition of this obligation is such that whereas by the final judgment of the supreme court of Tennessee, at Jackson, entered this day, the said Taxing District of Shelby County, Tennessee, has recovered judgment affirming the judgment of the circuit court of Shelby County, Tennessee, against the Memphis Gas Light Company for the sum of fifty dollars, and all cost' of the circuit and supreme courts, and a writ of error to supersede said judgement and remove the record for review to the Supreme Court of the United States, to be held in Washington, on the 2nd Monday of October, 1883, has been allowed upon the execution of this bond, by the Hon'l James W. Deaderick, chief-justice of said supreme court.

Now, therefore, if the said Memphis Gas Light Company should well and truly perform the judgment of the said Supreme Court of the United States upon said writ of error, and shall pay any judgment which it shall render or pay the said judgment of the supreme court of Tennessee, if that shall be the judgment of the Supreme Court of the United States, and shall also pay all costs that shall be adjudged against it by the Supreme

Court of the United States, then this obligation to be void; other-
27 wise to remain in full force and virtue.

Witness the seal of said Memphis Gas Light Company and the hand and seal of said sureties.

{SEAL OF MEMPHIS GAS-LIGHT COMPANY.}

THE MEMPHIS GAS LIGHT COMPANY,
NAPOLEON HILL. [SEAL.]
HENRY CROFT. [SEAL.]

JOSEPH CRAIG, *Sec'ty.*

Approved.

JAS. W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

(Endorsed:) Filed June 14th, 1883. D. P. Davis, deputy clerk.

28 *Writ of error & supersedeas.*

UNITED STATES OF AMERICA:

The Supreme Court of the United States to the supreme court of the State of Tennessee, at Jackson, Tennessee. (*Writ of error.*)

Whereas on the 13th day of June, 1883, final judgment was rendered by the supreme court of Tennessee, sitting at Jackson, against the Memphis Gas Light Company, a corporation chartered by law of the State of Tennessee, in favor of the Taxing District of Shelby County, Tennessee, in a certain cause pending in said supreme court on the Shelby County law docket, in which the Memphis Gas Light Company was plaint-
29 iff in error, and the Taxing District of Shelby County, Tennessee, was the defendant in error, for the sum of fifty dollars, and costs of the Supreme Court and the court below. And whereas it appears that in said judgment there is manifest error, and that the same may be reviewed by the Supreme Court of the United States, because it involves a Federal question:

This is therefore to command you to send to the Supreme Court of the United States, at Washington, to its term to begin on the 2ond Monday in October next, a full exemplification of said judgment and of the whole record in the said case, duly certified, signed, and sealed with the seal of your court, in order that the said Supreme Court of the United States may take such action and make such order therein as to it may
30 seem proper. This you will in no wise fail to do; and, proper supersedeas bond and security *have* been given and approved, the said judgment is and will be susperceeded, and you will proceed no further therein until the further order of the said Supreme Court of the United States.

Witness the Hon'l Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the supreme court of Tennessee hereto affixed, by order of the chief-justice thereof, this 14th June, 1883.

{SEAL OF SUPREME COURT OF TENNESSEE, AT JACKSON.}

JAMES W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

(Endorsed:) Filed June 14th, 1883. D. P. Davis, deputy clerk.

31 THE STATE OF TENNESSEE:

Supreme Court of the State of Tennessee, Jackson, Tennessee.

THE MEMPHIS GAS LIGHT COMPANY, PL'T'FF in error,
vs.
THE TAXING DISTRICT OF SHELBY COUNTY, Tennessee, defendant in error.

I, James W. Deaderick, chief-justice of the supreme court of Tennessee, sitting at Jackson, Tennessee, do hereby certify that in the above-stated case final judgment has been this day entered by said court against plaintiffs in error therein; and that the decision of said case and said judgment sustains the validity of an act of the Legislature of Tennessee, passed at its session in 1883, which Legislation it was claimed by said plaintiff in error—and this was the only question decided—to be invalid because it impairs the obligation of the contract of its charter granted by the
32 State of Tennessee.

Because the case involves this Federal question I allow the writ of error prayed for to remove the case to the Supreme court of the United States.

Witness my hand this 14th June, 1883.

JAS. W. DEADERICK,
Chief Justice Supreme Court of Tennessee.

33 *Citation.*

UNITED STATES OF AMERICA.

Supreme Court of the United States.

Citation.

To the taxing district of Shelby County, Tennessee:

You are hereby notified that in the case lately pending in the supreme court of Tennessee, at Jackson, between the Memphis Gas Light Company, plaintiff in error, vs. The Taxing District of Shelby County, Tennessee, de'f't in error, (law docket of Shelby, 939), upon petition of the said plaintiff in error, a writ of error and supersedeas has this day been allowed by the Hon. James W. Deaderick, chief-justice of the supreme court of Tennessee, upon bond approved by him, to remove the said
34 case to the Supreme Court of the United States for the review of that court, and suspend said judgment pending said writ of error.

Thereupon you are hereby cited to be and appear before the said Supreme Court of the United States, at Washington, at its term to begin the 2ond Monday in October, 1883, to show cause, if any you can, why the said judgment of the supreme court of Tennessee in said case should not be reviewed and reversed, and to do and perform what the said court may therein order. Fail not. To the sheriff of Shelby County, Tennessee, to execute and return.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the supreme court of
35 Tennessee hereunto affixed by order of the chief-justice thereof on this 14th day of June, 1883.

[SEAL.] JAS. W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

(Endorsed:) Issued June 14th, 1883. D. P. Davis, deputy clerk.

Sheriff's return.

Came to hand June 15th, 1883, and executed same day on the Taxing District of Shelby County by making known the contents of this writ to D. P. Hadden, president thereof.

W. D. CANNON,
Sheriff Shelby County.

36 THE STATE OF TENNESSEE:

I, S. D. Hays, clerk of the supreme court of the said State, do hereby certify that the foregoing pages comprise a true, perfect, and complete transcript of the record and proceedings in this court in the case of The Memphis Gas Light Company, plaintiff in error, against The President of Fire and Police Commissioners of the Taxing District of Shelby County, Tennessee, defendant in error, as the same appears of record and on file now in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in city of Jackson, on this 30th day of July,
37 A. D. 1883, and of the Independence of the United States the 108th year.

[SEAL.] S. D. HAYS, *Clerk*,
By R. WITHERSPOON, *D. C.*

(Indorsement on cover:) No. 926. The Memphis Gas Light Company, plaintiff in error, vs. The Taxing District of Shelby County, Tennessee. Tennessee supreme court. Filed August 17th, 1883.

3546——2

109-378

OFFICE SUPREME COURT U.S.
FILED
NOV 12 1883
JAMES H. McKENNEY, CLERK

Supreme Court of the United States

OCTOBER TERM, 1883.

THE MEMPHIS GAS LIGHT COMPANY,
Plaintiff in Error

vs.

TAXING DISTRICT OF SHELBY COUNTY,
TENNESSEE, Defendant in Error.

No. 926.

Craft & Cooper and Gantt & Patterson

ATTORNEYS FOR PLAINTIFF IN ERROR.

W. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

United States Supreme Court.

OCTOBER TERM, 1883.

THE MEMPHIS GAS LIGHT COMPANY,
Plaintiff in Error
vs.
TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.
No. 926.

STIPULATION OF COUNSEL.

The counsel for plaintiff in error and for defendant in error, in the above stated cause, make the following agreement and stipulation, to be printed with their briefs, and submitted to the Supreme Court of the United States as part of the record of the case.

I.

The Memphis Gas Light Company is an established corporation, and, as such, has been, for many years, doing business in the city of Memphis, in Tennessee, and in the Taxing District of Shelby county, since its creation, under the charter of which a copy is hereto appended, marked "Exhibit A," as part of this agreement.

II.

The charter of the city of Memphis was repealed by the General Assembly of the State of Tennessee, by an act passed January 29, 1879, which act is chapter 10, of the acts of the Legislature at its session in 1879. (*Page 13 of Session Acts of 1879.*)

The territory formerly embraced in the city of Memphis was made "The Taxing District of Shelby County" by an act of the General Assembly, passed January 29, 1879, which act is chapter 11, of the acts of that session. (*Session Acts page 15.*)

That act was amended at the same session of the Legislature, by an act passed March 12, 1879, which is chapter 84, page 98, of Session Acts.

This last mentioned act was so amended by the General Assembly, in 1883, as to declare the business of gas companies a privilege, and to assess a tax of $250 in favor of the Taxing District upon that privilege, and making the exercise of that privilege, without license from the Taxing District, a misdemeanor.

The titles of the said acts, with extracts therefrom showing the portions thereof involved in this litigation, are hereto appended, marked "Exhibit B," as part of this agreement.

The Taxing District by its ordinance accepted this legislation, and required the Gas Company to take out a license for the exercise of its privilege, and pay $250 for the same.

III.

A State tax, for State purposes, was assessed upon gas companies by the Legislature of Tennessee, at its session in 1883. (*Chapters 105 and 106 of the Session Acts.*)

The extracts hereto appended, marked "*Exhibit C*," as part of this agreement, are extracts from those acts, and are the portions thereof bearing upon the subject.

IV.

The acts of Assembly of Tennessee, 1879, March 13, chapter 84, p. 110, (of which the act of 1883, imposing a privilege tax on gas companies) is an amendment, after

enumerating the various taxable privileges within the Taxing District, among which are butchers, livery stable keepers, express companies, insurance companies, drays, street railroads, etc., provides,

§ 10. *Be it further enacted*, That each and every person "exercising any of the branches of business or occupa- "tions hereinbefore taxed, without having first paid the "tax thereon, or having obtained the license required to be "taken out, shall be guilty of a misdemeanor, and upon "arrest and conviction thereof, before the President of the "Board of Police and Fire Commissioners, shall be fined "for each separate offence, not less than $5 nor more than "$50."

It was under this section of the act of Assembly that the President of the Police and Fire Commissioners tried and fined plaintiff in error $50, which judgment was affirmed in the circuit and Supreme Court of the State.

CRAFT & COOPER,
For Plaintiff in Error.
C. W. HEISKELL,
J. B. HEISKELL,
For Taxing District.

Exhibit A.

CHARTER.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a company, to be entitled the "Memphis Gas Light Company," shall be and the same is hereby established, with a capital of one hundred thousand dollars, divided into shares of one hundred dollars each, and the subscribers, their successors and assigns are hereby created a body politic and corporate by the name and style of the "Memphis Gas Light Company," and under such name and style they may sue and be sued, contract and be contracted with; they may have and use a common seal; they may pass such rules, regulations and by-laws as may be deemed expedient, not inconsistent with the Constitution and laws of this State, and of the United States, and shall have succession and continue in existence for the period of ninety-nine years.

SEC. 2. All the rights, privileges, powers and restrictions contained in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth sections of an Act incorporating the Nashville Gas Light Company, passed November 21st, 1849, not inconsistent with the first section of this act, shall apply to the Memphis Gas Light Company as fully and completely as though the same were herein fully set forth and incorporated.

SEC. 3. The fifteenth section of an Act entitled "An Act to incorporate the town of Elizabethton, and for other purposes," passed December 31st, 1849, be and the same is hereby repealed.

SEC. 4. Robert C. Brinkley, John Trigg, Henry C. Walker, Samuel P. Walker and Wiley B. Miller are

hereby appointed Commissioners for the purpose of opening books of subscription; they shall give ten days notice of the time and place of opening books in the different newspapers published in Memphis, and after fifty-one thousand dollars in stock shall have been subscribed, the Commissioners shall give ten days notice and proceed to elect officers in the manner required in the act incorporating the Nashville Gas Light Company.

JORDON STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Passed November 20, 1851.

Sections of the Act authorizing the establishment of the Nashville Gas Light Company, referred to in the foregoing Act of Incorporation:

SECTION 2. The business of said Company shall be to establish and construct gas-works in the city of Nashville, and they may purchase and hold as much real estate as may be necessary and expedient for said business, and to secure any debt that may be due them.

SEC. 3. It shall be the duty of said Company to establish, within three years from the first day of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas light as may be required.

SEC. 4. To enable said Company to establish such works, they are hereby authorized and empowered to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes or alleys of the city of Nashville, in such manner as to produce the least possible inconvenience to the city or its inhabitants, or to travelers, and to take up the pavements or sidewalks: Provided, they shall afterwards repair the same with the least possible delay.

SEC. 5. The said Company shall have the privilege of erecting, establishing and constructing gas-works, and manufacturing and vending gas in the city of Nashville, by means of public works, for a term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other South-western cities; and for public lights, such sum as may be agreed upon by the Company and the public authorities of Nashville: *Provided*, said Company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas.

SEC. 6. The works and operations of said Company shall be so constructed and managed that no annoyance shall accrue therefrom to the health or comfort of the inhabitants of Nashville, and nothing in this act shall be so construed as to absolve the Company, their agents or officers from any legal proceedings to restrain or abate any nuisance arising from such works or operations.

SEC. 7. If any person or persons shall injure or destroy any portion of the gas fixtures or other property belonging to said Company, or shall willfully open a communication into the street or other gas pipes, or let on gas after it has been stopped by the Company, such person or persons shall be liable for all damages sustained by such proceedings, and also to a penalty not exceeding five hundred dollars, upon conviction by the proper authorities.

SEC. 8. That Washington Barrow, John Kirkman, Samuel R. Anderson, N. E. Alloway and Wm. T. Berry, or a majority of them shall be Commissioners to open books for the subscription of stock, which shall be kept open until they may deem that a sufficient amount has been subscribed; they shall then, by advertisement in the

newspapers, give at least thirty days notice to the stockholders to hold a meeting for the election of a board of seven directors, to whom shall be entrusted the management of the affairs of the Company, and who shall elect a President from their own number.

SEC. 9. The election of President and Directors shall be annual, and they shall fill any vacancy that may occur in their board, the said election to be held at the office of the Company at such time as the stockholders may appoint.

To enable any person to act as a member of the Board of Directors, or President, he must be the owner of ten shares of stock and be a citizen of this State.

For each and every share of stock he may hold, each stockholder shall be entitled to one vote, which may be given by proxy in the election of the Board of Directors.

Stock may be transferred on the books of the Company at any time previous to one month before the election.

SEC. 11. If any person or persons shall commit any of the offences enumerated in the seventh section, he, she or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as in other cases of misdemeanor.

SEC. 12. The stock of said Company shall all be paid in within three years from the organization thereof, in such proportions or installments, and at such times and places as may be required by the directory, and any stockholder failing to pay such installment, shall, at the discretion of the directory, forfeit to the Company all right, title and interest in, and to every share on account of which such default may have been made, or the directory, at their option, may cause suit to be instituted against such defaulting stockholder for the amount due on such forfeited share; and in the event of a forfeiture, the shareholders so forfeiting shall still be held individually and personally liable to the creditors of said Company, who were creditors at the time of the forfeiture, to the full amount unpaid of each share of stock so forfeited, and the directors may

dispose of the forfeited shares at their discretion. The Company shall not at any time, by releasing stockholders from payment of their shares, or any part thereof, nor by any other means, discharge such stockholder from his liability to the creditors of said Company, to the extent of any balance due or to become due on account of unpaid stocks.

LANDON C. HAYNES,
Speaker of the House of Representatives.
JOHN F. HENRY,
Speaker of the Senate.

Passed November 21, 1849.

Exhibit B.

CHAPTER XI.

A BILL *to establish Taxing Districts in this State, and to provide the means of local government for the same.*

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the several communities embraced in the territorial limits of all such municipal corporations in this State, as have had, or may have their charters abolished, or as may surrender the same under the provisions of this act, are hereby created Taxing Districts, in order to provide the means of local government for the peace, safety and general welfare of such districts.

SEC. 2. *Be it further enacted,* That the necessary taxes for the support of the governments thus established shall be imposed directly by the General Assembly of the State of Tennessee, and not otherwise. In administering the affairs, and for providing the means of local government in said districts, the following agencies and governing instrumentalities are hereby established.

* * * * * * *

Passed January 29, 1879.
Approved January 31, 1879.

CHAPTER LXXXIV.

An Act to amend an act entitled "An Act to establish Taxing Districts in this State and to provide the means of local government for the same," passed January 29, 1879, and approved January 31, 1879.

* * * * * * *

SEC. 7. *Be it further enacted*, That the following named kinds of business and occupations be and the same are hereby declared taxable privileges, and shall be taxed as herein provided, and the exercising of any of said privileges without first paying the tax hereby fixed, shall be a misdemeanor:

1. Every auctioneer, or firm of auctioneers, doing business at one place only, per annum, $75.00.

* * * * * * *

Passed March 12, 1879.
Approved March 13, 1879.

CHAPTER X.

A BILL *to be entitled An Act to amend sub-sections 4, 10, 14, 15, 38, 39, 45, 51, 52, 58 of section 7 of an act passed March 12, 1879, chapter 84, amended by an act passed April 4, 1881, Acts of 1881, chapter 96, and to make sub-section 59 of said section, sub-section 98, and to add to the privileges provided for in said section the privileges as herein provided.*

* * * * * * *

SEC. 11. *Be it further enacted*, That the following sections be added as sub-sections in said act, and that the following be made taxable privileges as herein provided:

* * * * * * *

74. Gas companies, $250 per annum.

* * * * * * *

Passed February 22, 1883.
Approved February 27, 1883.

Exhibit C.

CHAPTER CV.

An Act to provide more just and equitable laws for the assessment and collection of Revenue for State, county and municipal purposes; and to repeal all laws now in force whereby Revenue is collected from the assessment of Real Estate, Personal Property, Privileges and Polls.

* * * * * * *

SEC. 46. *Be it further enacted*, That the occupation and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license, are the following, viz:

* * * * * * *

Gas companies, * * * * *

CHAPTER CVI.

An Act to provide Revenue for the State of Tennessee and the counties thereof.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the State tax on every one hundred dollars' worth of taxable property shall be forty cents for the year 1883, and for every subsequent year thereafter; thirty cents of which shall be for State purposes and ten cents for school purposes.

* * * * * * *

SEC. 4. *Be it further enacted*, That the rate of taxation on the following privileges shall be as follows, *per annum:*

* * * * * * *

GAS COMPANIES in cities or towns of 40,000 inhabitants.. $200
In cities or towns of 20,000 to 40,000 inhabitants..... 150
In cities or towns of 10,000 to 20,000 inhabitants..... 100
In cities or towns under 10,000 inhabitants..... 50

* * * * * * *

Passed March 30, 1883.
Approved March 30, 1883.

United States Supreme Court.

OCTOBER TERM, 1883.

THE MEMPHIS GAS LIGHT COMPANY,
Plainteff in Error,
vs.
TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.
No. 926.

STATEMENT OF CASE.

On the 26th of April, 1883, Joseph Craig, Secretary of the Memphis Gas Light Company, the President being absent, was arrested upon a warrant issued by D. P. Hadden, President of the Fire and Police Commissioners of the Taxing District of Shelby county, Tennessee, charging that said company had committed the offense of doing business without *license* within the Taxing District of Shelby county, Tennessee, in violation of law and the ordinances of said Taxing District.

On the same day he was tried before the said D. P. Hadden, President of Fire and Police Commissioners of said District, and found guilty as charged, and the said Memphis Gas Light Company was fined $50, and said Joseph Craig, Secretary, was ordered to be committed to the "work house, the district prison," until said fine and costs were paid.

From this judgment the defendant appealed to the circuit court of Shelby county, Tennessee. The case was

tried in said circuit court on the 2d of May, 1883, by the court by agreement and consent of counsel, when a judgment was rendered against the defendant, and the fine was assessed at $50, and a judgment entered against the defendant and securities on the appeal bond for $50 and all costs.

From this judgment the defendant appealed in error to the Supreme Court of the State of Tennessee at Jackson, Tenn.

The Supreme Court affirmed the judgment of the circuit court, and defendant then petitioned for a writ of error and supersedeas, which was granted.

The error assigned is the judgment of the Supreme Court in affirming the judgment of the court below.

BRIEF FOR APPELLANTS.

The only question in this case is whether the Taxing District of Shelby county, Tennessee, can under the act of 1883, (Acts of 1883, chap. 10, page 13, sub. sec. 74, p. 14), levy and collect a license or privilege tax from the Memphis Gas Light Company, a corporation organized and doing business within the territory of said District, under its charter granted by the Legislature of Tennessee.

This act of 1883, under which said Taxing District claimed the right to levy and collect said tax, is amendatory to the act of 1879, chapter 84, p. 98, sec. 7, and to the act of 1881, chapter 96, p. 111.

The act of 1879, p. 104, section 7, is in these words:

"SEC. 7. *Be it further enacted*: That the following named kinds of business and occupations, be and the same are hereby declared taxable privileges," and shall be taxed as herein provided, and the exercising of any of said privileges without first paying the tax hereby fixed, shall be a misdemeanor."

In this act gas companies are not included in the enumeration of taxable privileges. The act of 1883, supra, chapter 10, sec. 11, sub. sec. 74, p. 14, by amendment adds in the list of taxable privileges gas companies, and fixes the license or privilege tax at $250 per annum.

We submit that the levy of this tax, and making it unlawful for the plaintiff in error to do business under its charter, without annually procuring the *license* required by this act, impairs the obligation of its charter contract and is in violation of the constitution of the State of Tennessee, Article 1, section 20, and of the United States, Article 1, section 10.

The charter was granted to the Memphis Gas Light Company by a special act of the Legislature, passed November 20, 1851.

The company was organized soon after the passage of this act, and has been doing business under its charter ever since.

Section 1 of this act incorporates the company under the name of the "*Memphis Gas Light Company*," and provides that said corporation "shall have succession and continue in existence for the period of ninety-nine years."

Sec. 2 provides that sections, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12 "of an act incorporating the Nashville Gas Light Company, passed November 21st, 1849, not inconsistent with

the first section of this act, shall apply to the Memphis Gas Light Company, as fully and completely as though the same were herein fully set forth and incorporated."

Section five is in these words:

"Sec. 5. The said company shall have the privilege of erecting, establishing and constructing gas-works, and manufacturing and vending gas in the city of Nashville (Memphis), by means of public works, for a term of fifty years from and after the date of this act. A reasonable price per thousand feet of gas shall be charged in case of private individuals, to be regulated by the prices of other Southwestern cities; and for public lights, such sums as may be agreed upon by the company and the public authorities of Nashville (Memphis): Provided, said company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville (Memphis) more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas."

Now we submit that this charter granting to the plaintiff in error "*the privilege*," for the period of ninety-nine years, of erecting works, manufacturing and selling gas, under the restrictions above, is a contract, binding upon the State, and that the act of 1883 under which this *privilege* or *license tax* is levied, violates this contract and is unconstitutional and void.

Woodfork v. The Union Bank, 3 Cold. 488.
Cooley on Constitutional Limitations p. 27, and authorities there cited.

The court will bear in mind that this is not a property tax—not a tax upon the *privilege* or *franchise* as property, but a tax upon the personal or corporate right to do busi-

ness. We concede that this *privilege* or *franchise* may be taxed as property under art. 11, sec. 28, of the Constitution of Tennessee, which is in these words: "The Legislature shall have power to tax merchants, pedlers and privileges in such manner as they from time to time may direct."

The distinction between a *privilege* or *franchise* as a valuable property, and as a personal or corporate right to do the thing privileged, is clear, and is recognized by all the authorities. The franchise or privilege of a private corporation is property, and may be taxed as such. The plaintiff in error has purchased and paid for the privilege of transacting the business authorized by its charter, and we submit that any subsequent act of the Legislature making it unlawful and "*a misdemeanor*" for the plaintiff in error to do the business authorized by its charter, without annually paying $250 privilege tax to the Taxing District is in clear violation of the charter contract, and consequently unconstitutional and void.

Dartmouth College v. Woodard, 4 Wheaton 518.
Cooley on Constitutional Limitations p. 27, and authorities there cited.
Lucas v. Commissioners, 11 Gill & Johnson (Md) 490.
Brown v. Maryland, 12 Wheaton 419.
U. S. Bank v. Osborne, 9 Wheaton 739.
45 Ala. 172. 3 Cold. 498. 8 Heiskell 642–3–4–5.

"That a license tax cannot be imposed on a franchise which a corporation has acquired by a surrender of valuable rights, was decided in Lucas v. The Lottery Commissioners, 11 Gill & Johnson (Md.) p. 490."

Cooley on Taxation p. 53 note.
Brown v. State of Maryland, 12 Wheaton 419.
U. S. Bank v. Osborne, 9 Wheaton 739.

"When a corporation is once established by statutory creation in a manner permitted by the constitution of the State, its privileges are beyond the control of the legisla-

tive authority, *unless* the right of control is in some way reserved. There is no such reservation here.

"Dartmouth College v. Woodard, 4 Wheaton 518.
Dodge v. Woolsey, 18 How. 331.
Jefferson Branch Bank v. Skelly 1 Black 436.
Bridge Protectors v. Hoboken, 1 Wall. 117.
The Bingham Bridge case, 3 Wall. 51."
Bronabert v. Tuscaloosa Scientific and Art Association, 45 Ala. 172.

If the act in question is constitutional plaintiff in error is now doing an unlawful business, notwithstanding its charter.

The Supreme Court of the United States, in the License Tax cases, 5 Wall. 472, uses this language:

"When a tax takes the form of a tax on the *privilege* of *following* an employment, convenience in collection, will commonly dictate the requirement of a *license* and the person taxed will be compelled to pay the tax as a condition to the right to carry on the *business at all*."

"In such a case the business carried on without a license will be illegal and no recovery can be had upon the contracts made in the course of it."

Bancroft v. Dumas, 21 Vt. 456.
Alexander v. Donnell, 12 Kans. 608.

This tax amounts to a prohibition. It makes the business which the plaintiff in error is now engaged in under its charter and in strict compliance with the charter, unlawful—a misdemeanor.

Justice Freeman of the Supreme Court of Tennessee, in the case of Butler v. The State, 3 Lea p. 224, uses this language:

"If the State can forbid the use and enjoyment of the right granted, except on terms of paying for the *privilege* the sum of ten dollars, she may as well exact ten hundred

dollars, or forbid it entirely. In this way the *privilege granted* may be rendered valueless, and the right purchased from the United States, be entirely destroyed for all practical purposes." State v. Butler, 3 Lea 224.

This was a case in which the Legislature had levied a privilege tax on a patent and required the patentee to pay the privilege tax before he would be allowed to sell his patent. It is an authority upon the point that the tax is a prohibition, and makes the business without a license unlawful.

The case of Mayor v. Charlton 36, Georgia p. 460, is a strong authority for us. Its syllabus is this:

1. "When a physician is licensed by the authority of the State to practice medicine, the city of Savannah cannot require him under a penalty, to take out license before he can practice his profession in the city."

2. "The practice of his profession in the city is the subject of taxation by the corporation but not of license."

The court in its opinion uses this language:

"But it is insisted that the city has authority to tax this physician under the law, Code sec. 4756, and that the license fee is a mere tax, and the paper called a license a receipt for the money, that this is really a contest about words merely, and substantially there is no difference between a license and a tax. We cannot assent to this. A tax is a rate or a sum of money assessed on the person, property, etc., of the citizen, while a license confers a privilege and makes the doing of something legal, which if done without it would be illegal. Under the name of a license, Dr. Charlton cannot be prohibited from availing himself, in the city, of the privilege conferred upon him by the State."

The Taxing District in our case is attempting to do to our client exactly what Savannah attempted to do to Dr.

Charlton under exactly the same state of facts. Dr. Charlton had a license from the State to practice his profession. Our client has a license from the State for ninety-nine years under its charter. The two cases, we submit, are upon the point in question identical.

The language of the act is too plain to admit of doubt. The tax clearly amounts to a prohibition. It makes it a misdemeanor punishable by fine and imprisonment for the Gas Company to do business under its charter unless it annually pays for the *privilege* of doing business a $250 privilege or license tax.

Under the authorities of Vermont, Kansas, cited supra, and others which might be cited, the Gas Company cannot collect a single bill for gas sold since the act imposing the privilege went into effect. That which is *malum prohibitum* is as much in violation of law as that which is *malum in se*. There may be a difference in the moral quality of the two acts, but each is equally in violation of the municipal law.

The Supreme Court of Tennessee in the case of W. W. Woodfork v. The Union Bank, 3 Coldwell p. 503, uses this emphatic language: "None of the essential franchises of the corporation granted by the charter of 1832, during the existence of the term to which it was limited, could be materially *altered*, *changed*, *modified* or *repealed*, by any subsequent act of the Legislature, without the unanimous consent of the stockholders. 2d Kent's Com. 352. Redfield on Railways sec. 56 sub. sec. 7 and note, also Stepliens v. Rutland & Burlington Railway, 1 Law Reports 154."

On page 498 the same case uses this language:

"The charter of a private corporation is in the nature of a special contract, and when once granted by the State, and accepted by the corporation, the Legislature has no

constitutional power to take away or impair the exercise of any of the essential franchises previously granted.

Trustees of Dartmouth College v. Woodward, 4 Wheaton 468.

Redfield on Railways, sec. ——.

Union Lock & Canal Company v. Toon, 1 Humphreys p. 44."

We submit that this act makes it a misdemeanor for the plaintiff in error to transact business under its charter, in strict accord and compliance with the terms and stipulations demanded by the State and contained in the charter, that it thus not only *modifies* and *impairs* the franchise and privilege granted in the charter, but it in effect *repeals* the charter and takes from the plaintiff in error the *franchise* and *privilege* granted to it by section 5 of the charter quoted supra, which is in these words: "The said company shall have the privilege of erecting, establishing and constructing gas works and manufacturing and vending gas, etc."

This we confidently submit is a greater infringement upon charter rights than the Dartmouth College case or the case of Woodfork v. The Union Bank, 3 Coldwell 222.

TAXABLE AS PROPERTY.

As before stated, we admit that under the constitution of Tennessee, charter franchises and privileges may be taxed as property.

This distinction is stated in Angell & Ames on Corporations, on pages 512 and 513, section 470, very clearly in the following language:

"The State of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school tax; this the court held would have exempted their *franchise* but *not their property from taxation.*

* * * * * * *

In giving their opinion, the court said: "A franchise is, in *every State* of the Union, recognized as property."

The bank capital attached to the franchise is *another* property owned in its parts by persons corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

The same authority, in note 1, page 513, uses this language:

"The decision of the court was, in fact, that a franchise as *property* is according to its value liable to taxation for the support of government, whether paid for by a bonus or not."

The distinction between a franchise or privilege as property and as a personal right is here clearly stated.

As property it is liable to taxation, as a personal privilege it is not, unless the right to tax it was reserved by the State when the charter was granted, as is said in the 45 Ala. case, supra, 172. This distinction is so clearly stated and sustained by the opinion of Justice Freeman in the Lawyers tax cases, 8 Heiskell, commencing on page 639, and ending on page 648, we quote in full this opinion:

OPINION BY FREEMAN, J.

"By the act of 1867-8, c. 129, s. 5., all lawyers setting themselves up as practicing attorneys, who have been practicing five years, shall pay a privilege tax of $15. By other sections of the Code, penalties of double the amount of the privilege tax are imposed for exercising any privilege without obtaining a license as required by law. This renders it unlawful for any man to exercise any privilege declared taxable, without payment of the tax imposed for grant of the privilege, and obtaining a license from the clerk of the county court. These privileges are granted annually on payment of the tax on the same, and without

such license, no party can lawfully exercise the privilege or engage in the occupation taxed. In other words the occupation is forbidden, and in the case of a lawyer of five years standing, notwithstanding his license by the proper authorities, acting according to law, he forfeits his rights, and is forbidden to follow his profession. He is simply deprived of, and forfeits his right thus obtained, and that without crime or judicial investigation. The question is, whether this can be sustained as a constitutional right on the part of the State, or whether such a law is in accordance with our own or the Federal constitution?

"The question is not whether the State may not declare the practice of the profession a privilege, and require in the future, all who desire to engage in it to pay a license tax, either on receiving such license, or to pay an annual tax on the same, but whether the State can declare that a privilege, which she has already granted, and revoke the license obtained under her authority, unless the party shall pay for and obtain an annual license under the law we are now considering?

"We hold this cannot be done *without impairing* the *obligation* of a contract, and that is to deprive a man of a right granted by the State, based on a valuable consideration paid by the lawyer in more or less toil and labor, given to the acquirement of the requisite qualification to obtain his license.

"In the case *ex parte* Garland, 4 Wall 374, *et seq.*, the character of a lawyer's right to practice his profession, to appear for clients and argue cases was well stated. It was substantially held that this was a valuable right, one acquired from the proper authorities, of which he could not be deprived, except for misconduct, or by the judgment of a court; that this right was something more than an indulgence, revocable at the pleasure of the court admitting the party to the bar, or even at the command of the Legislature. In that celebrated case it was decided, that to impose an oath

on an attorney, which he could not take, and require him after he had been admitted as an attorney to take such an oath, or not to be permitted to exercise the functions of his profession, was in the nature of attainder, having all the elements of a bill of pains and penalties, as once known in practice in the jurisprudence of England, and that no such punishment could be inflicted under the constitution of the United States. This puts this right on high grounds, but not higher than the truth and right of the case demands. These principles being conceded, then we assume, that the lawyer holds his right by virtue of a grant from the State, which grant is irrevocable, except upon the conditions implied by its nature, that the party shall not be guilty of conduct unworthy of the trust imposed in him. Should he be guilty of such conduct, then when the fact is judicially ascertained according to the forms of the law, he may be declared to have forfeited his right, but not otherwise.

"It is ingeniously argued, however, that this valuable right, granted by the State, is no more than a grant of land or other property from the State, or the grant of a franchise to a corporation, and that these are all taxable property, and not protected from this burden by reason of the grant. This we concede in its fullest extent has long been settled, the case of Providence Bank v. Billings, being perhaps the leading case on the subject. But the fallacy that underlies this argument is, in not distinguishing between *taxation* or *right* as *property at its value*, and making a privilege which can only be enjoyed by a license, and in effect depriving the party of the *granted privilege*, unless *he shall purchase it again* from the State, and *under our* system of laws buy it every year. This is a different thing from taxing a property or a right granted by the State *as property*, is in effect revoking the grant except upon the discharge of a new burden imposed, and which was not in the *contract at the* time, nor a part of the grant.

"We may concede that the right as a *valuable property*,

somewhat in the nature of a *franchise* may be taxed as property, as other valuable rights, such as the franchise of a bank or other corporation, but we deny that the right can be taken away or the grant revoked by the Legislature, except as we have indicated for misconduct judicially ascertained. This was held in a late case by the Supreme Court of Virginia. Ould & Carrington v. The City of Richmond, 23 Gratt. 464 Am. Rep. vol. 14, 139, 40, *et seq.*

"In that case, while it was held that the power of taxation 'extended to every trade or occupation, to every object of industry, use or enjoyment in every species of profession,' and therefore the lawyer's right or privilege might be taxed as property according to its value, and the limitation upon the exercise of this right by the Legislature and the security against its abuse, in the language of Chief Justice Marshall, was the influence of the constituent over the representative, yet the court say 'lawyers are now named among those to whom license may be granted or refused, and taxed. They could not be included in a provision to authorize a tax upon an occupation or business to which the council might grant or refuse a license, for a lawyer has obtained his license from the State, and it is not in the power of a municipality to deprive him of his right.' This, it is true, was a tax imposed by a municipality, but in pursuance of the fullest powers granted by the Legislature over all legitimate objects of taxation. The court adds substantially "that while the lawyer could not be deprived of his right, that it was, however, a valuable civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State, or by any municipal corporation where he resides and enjoys the privilege. It is a vested right, yet it is as property a legitimate subject of taxation as property to which a man has a valuable right.

"But to recur to a case of a franchise granted as law,

suppose the State should assume to revoke the grant and require that every corporation should repurchase its franchise by obtaining a license for the privilege, or that every grantee of land from the State, in order to the enjoyment of his lands, and impose a penalty for the exercise of the franchise in the one case, or the beneficial use of the land in the other, would any man hold that this was not a violation of the constitution of the United States? This would certainly be to impair the obligation of the contract in both cases, as well settled principles, in fact, would be to destroy the contract and arbitrarily make a new one.

"This we think is precisely the case before us. The Legislature by general law authorized the grant of a license to practice the profession of the law in all the courts of law and equity in the State, to parties who might fit themselves for it by proper professional learning, and give the evidence of good moral character as required by our statutes. The attainment of proper qualification and proficiency in the learning of the law, as contemplated by our law, is a work of time and toil. This time might be otherwise profitably employed in other pursuits. The young aspirant foregoes other advantages and with more or less expense he gives himself to the acquirement of the required qualifications. He satisfies the proper authority of his learning, complies with the terms required by the Legislature, and thereupon the State grants him the right to the exercise of his professional skill and use of his professional knowledge. This is henceforward by authority of the State, to be his vocation or calling—the means of his livelihood, he fondly hopes, perhaps, of great emolument, and it may be of high position and honors.

"He has fairly won his right to the grant of this privilege, and the State has through her authorized officers admitted the fact, and conferred it upon him by a grant of license as an attorney and counsellor at law. Can he be deprived of this valuable right except for misconduct?

"We hold not, unless the State cannot be bound by its

grants, but has the right to resume them at her pleasure! Not unless the State is not bound by the obligation of a contract (for this has all the elements of one, we believe, more than the celebrated case of Woodward v. Dartmouth College) and may disregard her's at her pleasure, and impose another; may prohibit the enjoyment of contracted rights granted by penalties that forbid their exercise. This cannot be done in our opinion while the constitution remains that forbids any 'State from impairing the obligation of a contract.' If the act now under consideration does not impair the obligation of the contract found on the face of every lawyer's license obtained before its enactment, then we are at a loss to see what could do it. The right granted by the State is revoked and is as effectually destroyed as if the Legislature should say, that any man who had been practicing law for five years, should no longer enjoy that right or exercise the privilege granted by his license. In fact, under this act, the lawyer included in its provisions would henceforward not practice his profession by virtue of his original license, but under the license by the county court clerk of the State. If he seeks to enjoy this right under the license granted by the judges who signed it, and under which he formerly exercised the privilege, he is forbidden to do so, and must annually obtain a license from the county court clerk, or his law license is so much waste paper to him.

"We do not think such a power can be exercised by the Legislature, and therefore the act is to be held void, as unauthorized by the constitution of the United States and of our own State.

"The argument based on the idea that this is a tax on a lawyer's privilege like that imposed on the merchant, we think overlooks one important and essential element of difference in the two cases. In the case of the merchant's tax, it is paid on granting the privilege and is the consideration for the license given him. In the case before us, a license has been granted upon good and sufficient consid-

eration in accordance with law. The question in the case of the lawyer is, whether after having obtained the grant, he can be again called on to be relicensed, and required to pay again for that which he already holds from the State, or be deprived of its enjoyment. The cases would be analogous if the State should require every merchant in the State after he had his license paid for, authorizing him to exercise the privilege for a year, again within the year to be relicensed to enjoy the same privilege, and forbid him from exercising it during the year without such new license. This would be to sell a party a privilege and then make it go for nothing, and require him to make a new contract in order to its enjoyment.

"In other words, we think the real question in this case is, whether the Legislature can arbitrarily revoke the license of any lawyer in the State, deprive him of his granted privilege and means of living by his profession, thus annulling the grant, or whether this grant is a contract binding on the State and as such irrevocable. We hold the last to be the true state of the case, and that the license is a contract which the State cannot impair.

"It is proper to add, that under this view of the case, the lawyer may be taxed as such, and his right or franchise pay as other valuable property or franchises, its due proportion of the burdens of the State according to its value, to be ascertained in such manner as the Legislature may deem best. In the Virginia case we have cited, the mode adopted was to divide the lawyers into classes and ascertain the value of the profession to each class, and tax it according to such value; while this may not reach perfect equality, it will so far approximate to it, that there can be no great injustice done—absolute equality has not and never can be attained in fixing the burdens imposed on the citizen; approximative justice is all that can be done. The result is, that the lawyer may be taxed, that is, his privilege may be taxed as property, but his license cannot be revoked. That this privilege already granted can only

be taxed on its value as other property. But that this privilege cannot be granted in the future, because the effect of this is to revoke that already granted.

"We need scarcely say that this does not affect in any way, the terms on which the Legislature may grant license in the future to persons seeking the privilege."

We have given the opinion of Justice Freeman in full, because it presents the argument for our position with great clearness and force. We submit that our case is a stronger one of contract under the protection of the constitution than the case of a *license* to practice law.

Angell & Ames in their excellent work on Corporations p. 516 and 517, sec. 476, use this language:

"Now it is a familiar maxim, that when a privilege is *granted, every thing* necessary to its undisturbed enjoyment, is also granted; every thing purchased carries with it what is necessary for the unmolested enjoyment of all that is purchased. There can be shown no difference in principle between an act of the Legislature which in terms impairs the obligation of a contract and one which produces the same effect in the construction and practical execution of it; both are repugnant to the constitution of the United States and void."

The same authors on p. 518 and 519, sec. 477, use this language:

"Now the power of a State to tax *ad libitum* a corporation franchise which it has from motives of policy unconditionally granted to a number of individuals and their successors, it has been asserted and decided by the Supreme Court of the United States would involve the power to destroy."

McCullough v. Maryland, 4 Wheaton 310.

Burrough on Taxation p. 166, sec. 85, uses this language:

"Tax on franchise—this tax in its essential nature, the same as a license tax and the same principle as to the power of the State to tax applies to domestic corporations, when they are *first chartered*, as applies to foreign corporations. In the case of a foreign corporation the bonus or tax is the price, is the amount paid for the *privilege* of exercising its corporate powers in the State; in the case of a domestic corporation it is the amount paid as the price of its *corporate existence*. It only exists by permission of the State, and the State may prescribe the terms on which *it will grant its permission*."

At the time the charter was granted to the plaintiff in error the State *prescribed* the terms upon which it could have an existence and do business. The Gas Company has complied with these terms and has invested large amounts of money upon the faith and confident belief that its chartered privileges would not be *materially changed* or *repealed*."

We submit that this act taxing the privilege secured to it by its charter as a *personal right* is in violation of the constitution and void as to the plaintiff in error.

The distinction, which we insist upon, between privileges and franchises as property, and as a *personal* or *charter right*, is clearly recognized by the same session of the Legislature of Tennessee, which enacted the law, under which the plaintiff in error has been found guilty of doing business without a license and from which it has appealed in error to this court.

See Acts of 1883, Chap. 105, Sec. 13, p. 107, which is in these words:

Sec. 13. *Be it further enacted*, That the privileges and franchises granted by the Legislature of this State to savings banks or institutions for savings, are hereby declared to be *personal property* and *liable* to *taxation as such* in the

town, ward or district where they are located, to an amount not exceeding the gross sum of their surplus earned and in possession of said banks or institutions, and the officers of such institutions or banks shall be examined on oath by assessors, as to the amount of such surplus, and the property of such banks and institutions shall be liable to seizure and sale for the payment of all taxes assessed upon them for said privileges and franchises."

It will hardly be contended that the Legislature could not have, in express terms, exempted from taxation the privilege or franchise granted to the plaintiff in error by its charter.

Cooley on Constitutional Limitations, on pages 280 1 is very clear on this point. His language is this:

"So far as the power of taxation is concerned, it has been so often decided by the Supreme Court of the United States, though not without remonstrance on the part of the State courts, that an agreement by the State for a consideration *received* or *supposed* to be *received*, that certain property, *rights* or *franchises* shall be exempt from taxation or be taxed at a certain agreed rate, is a *contract protected* by the constitution, that the question is no longer an open one."

It will not be denied that the plaintiff in error has paid an adequate consideration for its privilege or franchise. It has fully complied with the terms imposed upon it by its charter. No complaint on this score. In doing so, it has made large expenditures of money, which would be almost a clear loss, if its right to do business were arbitrarily taken from it. As property, we admit the privilege or right to do business under the charter may be taxed as "*saving banks* or *institutions* for *savings*" are taxed under sec. 13 of the Act of 1883, above quoted. Beyond this the Legislature cannot go. The granting of the privilege or right to do business by the Legislature to plaintiff in error

for a consideration as absolutely frees it from "*molestation, charge* or *prohibition*," as if the Legislature had in express terms exempted it from the privilege tax, now attempted to be imposed upon it. It is exempt by its contract from a privilege tax as effectually as if the charter had said so in terms—because, the privilege to do business is the very essence of its contract.

We are asked why this corporation may not be required to take out a license, as a privilege, and pay for it the arbitrary price fixed, if the butcher and the plumber can be so required. The answer may be given in another question: After the butcher or the plumber had taken out his license and paid for it, would it be competent for the Legislature to require him to take out *another* license and pay for it, to carry on the business covered by the first license? This corporation, in obtaining its charter, took out an irrevocable license to carry on its business for the period of ninety-nine years. If it can be required to take out another license to carry on the same business, then it might be required to take out still another, and so on *ad infinitum*.

The constitution of Tennessee requires all taxation to be *ad valorem*, except that the Legislature may tax merchants, peddlers and privileges on a different basis. This is a power to *tax* a privilege, or fix a price upon a grant of it, but not to *revoke* a privilege already granted by contract, or what is the same thing, inhibit its exercise except upon new terms imposed. The contract by which the privilege has already been secured, cannot be thus impaired in its obligation.

We ask the court to reverse the court below and render judgment for plaintiff in error.

Henry CRAFT & COOPER,
Attorneys for Plaintiff in Error.

Brief of Gantt & Patterson,

ON SAME SIDE.

I.

The corporation exists to do a particular business. *Made to do that business—that is its life.* Organically and functionally, this coporation is a *creature that lives, moves,* and has its being, in the manufacture and supply of illuminating gas to the inhabitants and public authorities of Memphis, by means of the machinery, pipes and appliances named in the grant of privileges, which is *its life.*

II.

To call this corporate life a *privilege,* and exact a privilege tax, as the price of *being,* would be a tax on the right to *exist,* and to pursue the one business, for which corporate life was given.

III.

The charter is an irrevocable license. The State's grant *to be* and pursue the one vocation, for which *being* was conferred. It can never be illegal TO BE, as long as that *license is in force.* A law which says to this corporation, pay me money, as the annual *price of existence,* or submit to punishment, and fines, and penalties as a law-breaker, would be of the most arbitrary and despotic character.

IV.

What would be thought of a law, even in case of the temporary revocable license, called a privilege license, which, whilst that license is in force, should exact another license tax? The only difference would be, in such case, that the one is a short revocable privilege license, and the other a much longer and irrevocable license.

V.

What else can a corporation do, but that which it was made to do? All else is *ultra vires.* It has but the one

pursuit. Natural persons have choice of many, and may, by paying for the privileged pursuits, follow them or not, at will.

VI.

Every corporation is created for the public good. It has a duty to perform for the public. It is a peculiar property in which both the stockholders and the public are interested. This service to the public is often what is paid for the privilege of *being*—for the right to *be* a *corporation* and *conduct* the *corporate business*.

VII.

As a person, the corporation owns property, *subject to taxation*.

1. Its corporate stock, whether in money, or lands and houses, and machinery and pipes.

2. Its franchises considered as property; an incorporeal hereditament.

3. The stockholder, although distinct and owning a *distinct property*, has a peculiar *valuable property* growing out of the corporate being, which is subject to tax.

When all these elements are taxed, the tax gatherer must pause, and "give us rest."

5. The charter license in this case, is a contract, and irrevocable.

6. There are some grants of this kind that are exclusive. Such corporations, as well as this, could be taxed *out of existence*, by simply making their right to do business a taxable privilege. The process would be short and sharp, and the result certain as fate.

Josiah Geo. GANTT & PATTERSON,
For Plaintiffs in Error.

109-398

OFFICE SUPREME COURT U. S.
FILED
NOV 12 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1883.

THE MEMPHIS GAS LIGHT COMPANY,
Plaintiff in Error
vs.
TAXING DISTRICT OF SHELBY COUNTY,
TENNESSEE, Defendant in Error.
No. 926.

BRIEF OF J. B. & C. W. HEISKELL

FOR APPELLEE.

W. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

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The case is sufficiently stated in the "Statement of Case," pages 11 and 12 of appellant counsel's brief.

We desire to call the particular attention of the court to the fact that appellant's charter contains *no exemption* from taxation, and that this tax is imposed directly by the Legislature of Tennessee.

The sole question upon this record therefore is, Can the Legislature impose a privilege tax upon a gas company chartered by the State of Tennessee, the charter containing no exemption from taxation?

The contention for appellant is, that without any special exemption from taxation in the company's charter, but by reason of the fact of incorporation alone, to establish gas works and make and vend gas, the Legislature forever bound itself not to impose a privilege tax on the corporation, and to do so is violating the contract it made with the corporation in granting the charter.

It would seem that the constitution of Tennessee and the company's charter also, completely answer this question.

The same constitution which gave the Legislature power to grant this charter of incorporation contains this provision: "No one species of property from which a tax may "be collected shall be taxed higher than any other species "of property of the same value. *But the Legislature* shall "have power to tax merchants, peddlers and *privileges in* "*such manner as they may from time to time direct.*"

Thomp. & Steger's Code p. 93.
Code of 1858, p. 39 § 28.

The provision in regard to granting charters of incorporation, which is left out of the constitution of 1870, was in the constitution of 1834 in these words: "The Legisla- "ture shall have no power to suspend any general law for "the benefit of any particular individual, nor to pass any "law for the benefit of individuals, inconsistent with the "general laws of the land; * * * *provided always*, the Legis- "lature shall have power to grant such charters of incor- "poration as they may deem expedient for the public good."

Code of 1858, p. 49 § 7.

It is therefore with confidence submitted, that it is a part of every act of incorporation containing no special exemption from taxation, written in the charter by the constitution itself, "*but this charter is not to exempt this corporation from* "*such privilege taxes as the Legislature may from time to time* "*direct.*"

Without special exemption against taxation in their charter, the corporators accepted it with this provision in it—as much a part of it as if inserted *in haec verba* in the body of it.

This settled, there is nothing left in the case.

It may be proper to state the construction given by the Tennessee Supreme Court to the constitutional provision in regard to privileges. It is this:

"The exercise of an occupation or business which re-
"quires a license from some proper authority designated
"by a general law, and not open to all or any one without
"such license, is a privilege within the meaning of the con-
"stitution."

Schlier v. State, 3 Heis. 281.
See also Wiltse & Pratt v. State, 8 Heis. 544.
Jenkins v. Irwin, Ib. 456, 476.
Mabry v. Tarver, 1 Hump. 94–98.
Adams v. May. and Ald. Somerville, 2 Head 363.

In the last case *supra* the court say "that, as to property,
"taxation shall be according to value, * * but the tax-
"ation of privileges is in the *discretion* of the Legislature,
"and is to be exercised in such manner as that body may
"from time to time direct."

The constitution having in express terms conferred upon the Legislature the power to tax privileges, the Legislature may tax avocations which are not in themselves or in their nature privileges, by prohibiting them in general by law, and then granting a license to pursue them to those who will pay a tax therefor.

Mabry v. Tarver, 1 Hump. 98.
Acc. 4 Sneed 195, 3 Head 414.
3 Heiskell 281, 8 Ib. 475–547.
3 Tenn. Chy. 591.

Privileges may be taxed at the discretion of the Legislature, in whatever proportion they choose.

1 Hump. *supra*. 5 Cold. 558. 2 Head 366.

The Legislature may levy a specific tax upon a privilege without regard to the extent of the business done by the party, or may graduate the amount of the tax by the extent of the party's business and quantity of goods sold.

State v. Crawford, 2 Head 462. 8 Heis. 478.

Or may graduate the amount of the tax by the popula-

tion of the town or city in which the privilege is exercised.
3 Heis. 281. 8 Ib. 455.

They may tax privileges without restriction either as to the manner or mode of exercising the power.
8 Heis. 478.

What is the contract this Gas Company has with the State? It is a contract by which, for a supposed consideration paid to the State, the State agrees that this company may make and vend gas in Memphis for ninety-nine years, from 1851. But is it thereby exempt from those burdens of government which natural citizens have to pay for the privilege of doing business?

Chief Justice Marshall answers this question, and, indeed, every question in this case, in Providence Bank v. Billings, 4 Pet. 559.

There the Bank was chartered by the State of Rhode Island with the usual powers of such associations. In 1822 the Legislature of Rhode Island passed an act "imposing a duty on licensed persons and others, and bodies corporate within the State, by which, among other things, it is enacted that there shall be paid, for the use of the State, by each and every bank within the State, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in."

The Bank resisted the payment of the tax and sued the officers in pursuance of the law who levied a distress warrant for the tax. Judgment for defendants and appeal. Marshall, Chief Justice, delivering the opinion of the court, says:

"It is not denied that the charter incorporating the "Bank is a contract. Is this contract impaired by taxing "the banks of the State?

"This question is answered by the *charter itself*. It con-

"tains no stipulation promising exemption from taxation. "The State then has made no express contract which has "been impaired by the act of which the plaintiffs com- "plain. No words have been found in the charter which, "in themselves, would justify the opinion that the power "of taxation was in view of *either of the parties*, and that "an exemption of it was intended, though not expressed. "The plaintiffs find great difficulty in showing that the "charter contains a promise, either expressed or implied, "not to tax the bank. The elaborate and ingenious argu- "ment which has been urged, amounts, in substance, to "this: The charter authorizes the bank to employ its "capital in banking transactions for the benefit of the "stockholders. It binds the State to permit these trans- "actions for this object. Any law arresting directly the "operations of the bank would violate this obligation and "would come within the prohibition of the constitution. "But as that cannot be done circuitously which may not "be done directly, the charter restrains the State from pass- "ing any act which may indirectly destroy the profits of "the bank. * * * Now, whatever may be the rule of "expediency, the constitutionality of a measure depends, "not on the degree of its exercise, but on its principle. A "power, therefore, which may in effect destroy the charter, "is inconsistent with it and is impliedly renounced by "granting it. Such a power cannot be exercised without "impairing the obligation of the contract. * * * This "is substantially the argument for the bank," as it is in the case at bar.

"The taxing power is of vital importance. * * * It "would seem that the relinquishment of such a power is "never to be assumed. * * Its abandonment ought "not to be presumed in a case in which the deliberate pur- "pose of the State to abandon it does not appear.

* * * "The plaintiffs would give to this charter the "same construction as if it contained a clause exempting "the bank from taxation on its stock in trade. But can it

"be supposed that such a clause would not enlarge its "privileges? They contend that it must be implied, be- "cause the power to tax may be so wielded as to defeat the "purpose for which the charter was granted. And may "not this be said with equal truth of other legislative pow- "ers? Does it not apply with equal force to every incor- "porated company? * * * If the policy of the State "should lead to the imposition of a tax on unincorporated "companies, could those which might be incorporated "claim an exemption, in virtue of a charter which does "not indicate such an intention? The time may come when "a duty may be imposed on manufactories. Would an in- "corporated company be exempt from this duty as a mere "consequence of its charter?

"The great object of an incorporation is to bestow the "character and properties of individuality on a collective "and changing body of men. This capacity is always "given to such a body. *Any privileges* which may *exempt* "*it from the burdens common to individuals, do not flow neces-* "*sarily from the charter, but must be expressed in it, or they do* "*not exist.* * * We must look for the exemption in the "language of the instrument, and if we do not find it there, "it would be going very far to insert it by construction."

* * * * * * * * * *

"If the grant of power to trade in money to a given amount "implies an exemption of the stock in trade from taxa- "tion, because the tax may absorb all the profits, then the "grant of any other thing implies the same exemption, for "that thing may be taxed to an extent which will render it "totally unprofitable to the grantee. Land, for example, "has in many, perhaps in all the States, been granted by the "government since the adoption of the constitution. This "grant is a contract, the object of which is, that the profits "issuing from it shall enure to the benefit of the grantee. "Yet the power of taxation may be carried so far as to ab- "sorb these profits. Does this impair the obligation of "the contract? The idea is rejected by all. * * And

"yet if the proposition for which the plaintiffs contend be "true, it carries us to this point.

"That proposition is, that a power which is in itself ca- "pable of being exerted to the total destruction of the "grant is inconsistent with the grant, and is therefore im- "pliedly relinquished by the grantor, though the lan- "guage of the instrument contains no allusion to the sub- "ject. If this be an abstract truth it may be supposed uni- "versal. But it is not universal, and therefore its truth "cannot be admitted, in these broad terms, in any case. "We must look for the exemption in the language of the "instrument, and if we do not find it there it would be go- "ing very far to insert it by construction." * *

Commenting upon McCullough v. Maryland, 4 Wheat. 316, Osborn v. Bk. U. S., 9 Wheat. 738, the court say: "Both of these cases proceeded on the admission that an "incorporated bank, unless its charter shall express the "exemption, is no more exempted from taxation than an "unincorporated company would be, carrying on the same "business."

According to this case the charter of an incorporated company gives it being—"bestows the character and prop- "erties of individuality on a collective and changing body "of men."

In such capacity the corporators can do the business prescribed by the charter. But can they do that business free from the burdens common to natural persons?

The case answers that question.

"*Any privileges* which may exempt it from the burdens "common to individuals do *not flow* necessarily from the "charter, but must be expressed in it, *or they do not exist.*" The privilege of exemption of its property from taxation must be found there, or it does not exist. The privilege

of exemption from privilege taxes must be found there, or it does not exist. As to this, there is no distinction in respect to these two classes of taxation, or if a distinction, it is largely in favor of the imposition of privilege taxes, under the constitution of Tennessee.

It requires the charter of incorporation to invest the collective body with capacity to do business at all. It requires special exemptions in the charter to enable the collective body to do this business on more favorable terms than natural persons. Without the special exemptions, it stands on the same plane with natural persons, as to the imposition of all taxes. To hold otherwise would make the creature of the Legislature superior to the creator. What reason, or principle of justice, would impose a privilege tax upon butchers, bakers and gas-fitters, and withhold the same tax from gas-makers?

So the Supreme Court of the State of Tennessee has repeatedly said "exemptions from taxation are contrary to public policy, and can only be allowed when granted in clear and unmistakable terms."

Wilson v. Gaines, 9 Bax. 551.
Railroad v. Marion Co., 7 Lea 665.

Opposing counsel have quoted in full Judge Freeman's opinion in the lawyers' tax case. It is the argument of the individual Judge, in many respects unsound. The decision in that case rests on the ground that lawyers being officers of court, and necessary for the transaction of business in the courts, cannot be required to pay a privilege tax, and on the further ground that the act required lawyers who had already obtained a license to obtain a yearly license. The last view holds the license a contract. Conceding the correctness of the first ground, the second is unsound. A license is not a contract. The State may grant a license to-day, and require a license tax to be paid, and to-morrow require another license and license tax from the

same person for doing the same business. And the Supreme Court of Tennessee has so held.

In Kelly v. Dwyer, 7 Lea 181, they say: "A merchant's "license is not a contract, and the State may change the "rate of taxation during the period for which it is issued, "and the merchant must pay taxes according to the rate "fixed by law at any given time."

So Burroughs on Taxation, p. 148, says: "A license is "a personal privilege. It is not a contract. It is what its "name purports—the written evidence of the permission "of the State granted to one of its citizens to engage in a "particular calling or avocation. The tax paid is not re-"garded as the consideration which moves the granting "of the privilege, but one of the conditions attached to the "exercise of the privilege, a condition that must be com-"plied with to entitle the party to enjoy the privilege at "all. This permission may be revoked, annulled or amend-"ed at the pleasure of the Legislature."

See also cases there cited.

We would say it was simply the evidence of the payment of the privilege tax, put in the form of a permit to adapt it to the forms adopted to enforce its collection.

As the purpose of the license is to prove payment of the tax, so the object of the charter is to grant corporate and continued existence and limited liability, and necessarily to define the purpose for which the creation is to operate, which is done in the form of a grant of powers to do those things necessary to carry out that purpose. Without this, the corporate existence would be created without an object. The grant of power is merely the equivalent of a declaration that the purposes for which *this* corporate body is to act, and to which it is to be confined, is the making of gas, etc. It is merely the definition of the limits and boundaries within which its corporate functions are to be effective.

But another of the learned judges in the lawyers' tax case fully recognizes the principle we insist on. At page 634, (8 Heiskell,) Nicholson, C. J., says: "The right of a "corporation to exercise its franchises and privileges is "absolute, but if the charter contains no express exemption "from taxation, the power to tax *the privilege exists.*"

The same court held, in 4 Lea 644, that all foreign insurance companies doing business in Tennessee, must pay a privilege tax of $200 per annum. The same act imposed a similar tax on domestic insurance companies, which they have paid without contest. So, the same court held, that the Memphis and Little Rock Railroad running an express department, should pay a privilege tax on this department.

The act of 1873, (Acts of 1873, ch. 118, § 46, p. 180–1.) imposed a privilege tax on banking, express companies, insurance companies and telegraph companies. All of these have been paid without contest ever since. See Telegraph Company v. State, 9 Baxter, where it was held that the telegraph company must pay privilege tax. Also, insurance companies. 4 Lea 646. And this court held, a license tax on express companies valid, in Osborne v. Mobile, 16 Wal. 479. It is true this qnestion was not made there, but if there was anything in the question, the court would have held the tax void on the ground here taken by opposing counsel.

See also, So. Express Co. v. Mobile, 49 Ala. 404.
Lewis v. Gore, 46 Mo. 574.

By universal construction from time immemorial, asserted by the State and submitted to by corporations, the power to tax the privilege has been regarded as existing.

Cooley on Taxation, page 385–6, says: "Taxation on "privileges usually is confined to employment in some "particular exceptional, because specially profitable, or "because the privilege is in the nature of a franchise, or

"because they supply a general demand, so that the burden "imposed will be generally distributed. But no employ- "ment is absolutely exempt from the liability to be taxed. "The necessities of government may require that the lowest "employment as well as the most lucrative, shall contrib- "ute to its support, and if any is exempt, motives of policy "will govern the discrimination. If the privilege tax is "required to be paid before license to carry on the busi- "ness, then the tax is a condition *precedent to carrying on "the business*, and to carry it on without *license would make "the business unlawful.* * * In this particular all valu- "able privileges stand on the same footing; they are all "liable to taxation at the will of the State, *unless the State "has bargained to exempt them.*"

So, 2 Dil. Mu. Cor., 3d ed., § 789, (2d 628,) says: "The "property of a *street railway* company, including its road- "bed, situate within the limits of a municipal corporation, "is ordinarily subject to the taxing power; and if no dif- "ferent provision be made, it is held that a street railroad "may be taxed as real estate. An exclusive municipal "grant to such a railway company to use the streets in the "municipality does not exempt it from municipal control "nor deprive the municipal authorities of the right, other- "wise existing, to *require the company to pay a license or tax.*" Citing State v. Herod, 29 Iowa 123. "Nor does the "payment of a tax or license of a specified sum or amount "on each car employed by a city railway company to the "city, as required by the contract between the company "and the city, in which certain privileges are secured to "the company, exonerate the company from the payment "of an *ad valorem* tax on its property, horses, stables and "shops, which are assessable for municipal purposes."

New York v. Railway Co., 17 Hun. (N.Y.) 242.
Railway Co. v. Phila., 101 U. S. 528.

The street railroad in Memphis has accordingly paid for years a privilege tax of $30 on each car, and also its *ad va-*

lorem taxes. And what divinity doth hedge appellant that it should not likewise pay its privilege tax, is hard to divine.

In the Illinois Mutual Fire Insurance Co. v. the city of Peoria, 29 Ill. 180, the exact question here in controversy is decided. There the same arguments, here pressed by opposing counsel, were relied on. But the court decided that the company must pay the privilege tax.

We submit therefore that the judgment of the Supreme Court of Tennessee should be affirmed.

See the opinion of that court, Record F. 17.

J. B. HEISKELL AND
C. W. HEISKELL,
For Appellee.

United States Supreme Court.

OCTOBER TERM, 1883.

THE MEMPHIS GAS LIGHT COMPANY,
Plaintiff in Error

vs.

TAXING DISTRICT OF SHELBY COUNTY,
TENNESSEE, Defendant in Error.

No. 926.

STIPULATION OF COUNSEL.

The counsel for plaintiff in error and for defendant in error, in the above stated cause, make the following agreement and stipulation, to be printed with their briefs, and submitted to the Supreme Court of the United States as part of the record of the case.

I.

The Memphis Gas Light Company is an established corporation, and, as such, has been, for many years, doing business in the city of Memphis, in Tennessee, and in the Taxing District of Shelby county, since its creation, under the charter of which a copy is hereto appended, marked "Exhibit A," as part of this agreement.

II.

The charter of the city of Memphis was repealed by the General Assembly of the State of Tennessee, by an act passed January 29, 1879, which act is chapter 10, of the acts of the Legislature at its session in 1879. (*Page 13 of Session Acts of 1879.*)

The territory formerly embraced in the city of Memphis was made "The Taxing District of Shelby County" by an act of the General Assembly, passed January 29, 1879, which act is chapter 11, of the acts of that session. (*Session Acts page 15.*)

That act was amended at the same session of the Legislature, by an act passed March 12, 1879, which is chapter 84, page 98, of Session Acts.

This last mentioned act was so amended by the General Assembly, in 1883, as to declare the business of gas companies a privilege, and to assess a tax of $250 in favor of the Taxing District upon that privilege, and making the exercise of that privilege, without license from the Taxing District, a misdemeanor.

The titles of the said acts, with extracts therefrom showing the portions thereof involved in this litigation, are hereto appended, marked "Exhibit B," as part of this agreement.

The Taxing District by its ordinance accepted this legislation, and required the Gas Company to take out a license for the exercise of its privilege, and pay $250 for the same.

III.

A State tax, for State purposes, was assessed upon gas companies by the Legislature of Tennessee, at its session in 1883. (*Chapters 105 and 106 of the Session Acts.*)

The extracts hereto appended, marked "*Exhibit C*," as part of this agreement, are extracts from those acts, and are the portions thereof bearing upon the subject.

IV.

The acts of Assembly of Tennessee, 1879, March 13, chapter 84, p. 110, (of which the act of 1883, imposing a privilege tax on gas companies) is an amendment, after

enumerating the various taxable privileges within the Taxing District, among which are butchers, livery stable keepers, express companies, insurance companies, drays, street railroads, etc., provides,

§ 10. *Be it further enacted*, That each and every person "exercising any of the branches of business or occupa- "tions hereinbefore taxed, without having first paid the "tax thereon, or having obtained the license required to be "taken out, shall be guilty of a misdemeanor, and upon "arrest and conviction thereof, before the President of the "Board of Police and Fire Commissioners, shall be fined "for each separate offence, not less than $5 nor more than "$50."

It was under this section of the act of Assembly that the President of the Police and Fire Commissioners tried and fined plaintiff in error $50, which judgment was affirmed in the circuit and Supreme Court of the State.

CRAFT & COOPER,
For Plaintiff in Error.
C. W. HEISKELL,
J. B. HEISKELL,
For Taxing District.

Exhibit A.

CHARTER.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a company, to be entitled the "Memphis Gas Light Company," shall be and the same is hereby established, with a capital of one hundred thousand dollars, divided into shares of one hundred dollars each, and the subscribers, their successors and assigns are hereby created a body politic and corporate by the name and style of the "Memphis Gas Light Company," and under such name and style they may sue and be sued, contract and be contracted with; they may have and use a common seal; they may pass such rules, regulations and by-laws as may be deemed expedient, not inconsistent with the Constitution and laws of this State, and of the United States, and shall have succession and continue in existence for the period of ninety-nine years.

SEC. 2. All the rights, privileges, powers and restrictions contained in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth sections of an Act incorporating the Nashville Gas Light Company, passed November 21st, 1849, not inconsistent with the first section of this act, shall apply to the Memphis Gas Light Company as fully and completely as though the same were herein fully set forth and incorporated.

SEC. 3. The fifteenth section of an Act entitled "An Act to incorporate the town of Elizabethton, and for other purposes," passed December 31st, 1849, be and the same is hereby repealed.

SEC. 4. Robert C. Brinkley, John Trigg, Henry C. Walker, Samuel P. Walker and Wiley B. Miller are

hereby appointed Commissioners for the purpose of opening books of subscription; they shall give ten days notice of the time and place of opening books in the different newspapers published in Memphis, and after fifty-one thousand dollars in stock shall have been subscribed, the Commissioners shall give ten days notice and proceed to elect officers in the manner required in the act incorporating the Nashville Gas Light Company.

JORDON STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Passed November 20, 1851.

Sections of the Act authorizing the establishment of the Nashville Gas Light Company, referred to in the foregoing Act of Incorporation:

SECTION 2. The business of said Company shall be to establish and construct gas-works in the city of Nashville, and they may purchase and hold as much real estate as may be necessary and expedient for said business, and to secure any debt that may be due them.

SEC. 3. It shall be the duty of said Company to establish, within three years from the first day of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas light as may be required.

SEC. 4. To enable said Company to establish such works, they are hereby authorized and empowered to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes or alleys of the city of Nashville, in such manner as to produce the least possible inconvenience to the city or its inhabitants, or to travelers, and to take up the pavements or sidewalks: Provided, they shall afterwards repair the same with the least possible delay.

SEC. 5. The said Company shall have the privilege of erecting, establishing and constructing gas-works, and manufacturing and vending gas in the city of Nashville, by means of public works, for a term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other South-western cities; and for public lights, such sum as may be agreed upon by the Company and the public authorities of Nashville: *Provided*, said Company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas.

SEC. 6. The works and operations of said Company shall be so constructed and managed that no annoyance shall accrue therefrom to the health or comfort of the inhabitants of Nashville, and nothing in this act shall be so construed as to absolve the Company, their agents or officers from any legal proceedings to restrain or abate any nuisance arising from such works or operations.

SEC. 7. If any person or persons shall injure or destroy any portion of the gas fixtures or other property belonging to said Company, or shall willfully open a communication into the street or other gas pipes, or let on gas after it has been stopped by the Company, such person or persons shall be liable for all damages sustained by such proceedings, and also to a penalty not exceeding five hundred dollars, upon conviction by the proper authorities.

SEC. 8. That Washington Barrow, John Kirkman, Samuel R. Anderson, N. E. Alloway and Wm. T. Berry, or a majority of them shall be Commissioners to open books for the subscription of stock, which shall be kept open until they may deem that a sufficient amount has been subscribed; they shall then, by advertisement in the

newspapers, give at least thirty days notice to the stockholders to hold a meeting for the election of a board of seven directors, to whom shall be entrusted the management of the affairs of the Company, and who shall elect a President from their own number.

SEC. 9. The election of President and Directors shall be annual, and they shall fill any vacancy that may occur in their board, the said election to be held at the office of the Company at such time as the stockholders may appoint.

To enable any person to act as a member of the Board of Directors, or President, he must be the owner of ten shares of stock and be a citizen of this State.

For each and every share of stock he may hold, each stockholder shall be entitled to one vote, which may be given by proxy in the election of the Board of Directors.

Stock may be transferred on the books of the Company at any time previous to one month before the election.

SEC. 11. If any person or persons shall commit any of the offences enumerated in the seventh section, he, she or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as in other cases of misdemeanor.

SEC. 12. The stock of said Company shall all be paid in within three years from the organization thereof, in such proportions or installments, and at such times and places as may be required by the directory, and any stockholder failing to pay such installment, shall, at the discretion of the directory, forfeit to the Company all right, title and interest in, and to every share on account of which such default may have been made, or the directory, at their option, may cause suit to be instituted against such defaulting stockholder for the amount due on such forfeited share; and in the event of a forfeiture, the shareholders so forfeiting shall still be held individually and personally liable to the creditors of said Company, who were creditors at the time of the forfeiture, to the full amount unpaid of each share of stock so forfeited, and the directors may

dispose of the forfeited shares at their discretion. The Company shall not at any time, by releasing stockholders from payment of their shares, or any part thereof, nor by any other means, discharge such stockholder from his liability to the creditors of said Company, to the extent of any balance due or to become due on account of unpaid stocks.

LANDON C. HAYNES,
Speaker of the House of Representatives.
JOHN F. HENRY,
Speaker of the Senate.

Passed November 21, 1849.

Exhibit B.

CHAPTER XI.

A BILL *to establish Taxing Districts in this State, and to provide the means of local government for the same.*

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the several communities embraced in the territorial limits of all such municipal corporations in this State, as have had, or may have their charters abolished, or as may surrender the same under the provisions of this act, are hereby created Taxing Districts, in order to provide the means of local government for the peace, safety and general welfare of such districts.

SEC. 2. *Be it further enacted*, That the necessary taxes for the support of the governments thus established shall be imposed directly by the General Assembly of the State of Tennessee, and not otherwise. In administering the affairs, and for providing the means of local government in said districts, the following agencies and governing instrumentalities are hereby established.

* * * * * * *

Passed January 29, 1879.
Approved January 31, 1879.

CHAPTER LXXXIV.

An Act to amend an act entitled "An Act to establish Taxing Districts in this State and to provide the means of local government for the same," passed January 29, 1879, and approved January 31, 1879.

* * * * * * *

SEC. 7. *Be it further enacted*, That the following named kinds of business and occupations be and the same are hereby declared taxable privileges, and shall be taxed as herein provided, and the exercising of any of said privileges without first paying the tax hereby fixed, shall be a misdemeanor:

1. Every auctioneer, or firm of auctioneers, doing business at one place only, per annum, $75.00.

* * * * * * *

Passed March 12, 1879.
Approved March 13, 1879.

CHAPTER X.

A BILL *to be entitled An Act to amend sub-sections 4, 10, 14, 15, 38, 39, 45, 51, 52, 58 of section 7 of an act passed March 12, 1879, chapter 84, amended by an act passed April 4, 1881, Acts of 1881, chapter 96, and to make sub-section 59 of said section, sub-section 98, and to add to the privileges provided for in said section the privileges as herein provided.*

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SEC. 11. *Be it further enacted*, That the following sections be added as sub-sections in said act, and that the following be made taxable privileges as herein provided:

* * * * * * *

74. Gas companies, $250 per annum.

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Passed February 22, 1883.
Approved February 27, 1883.